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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1946.**

**No. 448.**

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**IN THE MATTER OF  
VAN SWERINGEN CORPORATION,**

*Debtor,*

**and**

**THE CLEVELAND TERMINALS BUILDING COMPANY,**

*Subsidiary Debtor.*

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**THE CLEVELAND HOTEL PROTECTIVE COMMITTEE,**

**J. C. LINCOLN, GORDON MACKLIN, ROBERT H. JAMISON,**

**MELVIN B. HOTT AND ROY BRENHOLTS,**

**Individually and as Members of said Committee,**

**and**

**THE HENRY GEORGE SCHOOL OF SOCIAL SCIENCE,**

**Intervening Petitioners,**

*Petitioners,*

**vs.**

**THE NATIONAL CITY BANK OF CLEVELAND,**

**Successor Trustee,**

**and**

**THE CLEVELAND TERMINALS BUILDING COMPANY,**

*Respondents.*

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**IN PROCEEDINGS FOR THE REORGANIZATION  
OF A CORPORATION.**

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**ON PETITION FOR WRIT OF CERTIORARI,  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE SIXTH CIRCUIT.**

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**REJOINDER BRIEF FOR RESPONDENT,  
THE NATIONAL CITY BANK OF CLEVELAND,  
SUCCESSOR TRUSTEE,  
OPPOSING PETITION FOR WRIT OF CERTIORARI.**

### INTRODUCTION.

Counsel in the Reply Brief of Petitioners continue to persist in ignoring a number of undisputed facts; at the same time, they take unjustified liberties in paraphrasing the arguments of this respondent. In this situation, a short rejoinder to the Petitioners' Reply Brief seems in order.

As in the brief heretofore filed for it, the respondent, The National City Bank of Cleveland, Successor Trustee, will hereinafter be referred to as the "Trustee," and the respondent, the subsidiary debtor, The Cleveland Terminals Building Company, will hereinafter be referred to as the "Building Company."

### THE FACTS.

Among the undisputed facts, most of which are ignored in the Petitioners' Reply Brief, are the following:

1. The Trustee, as Successor Trustee under the Declaration of Trust, dated April 1, 1927, owns a title to the Cleveland Hotel property. Under said Declaration of Trust there have been issued so-called fee ownership certificates evidencing seven thousand equal interests. Irrespective of how those interests may be characterized, they are subject to the provisions of the Declaration of Trust, which provides, *inter alia*, in Article V (R. 116) as follows:

"In the event that the Lessee shall make default in any of the provisions of the Lease \* \* \* then the Trustee shall have full authority to terminate the Lease \* \* \*, and in such case *or in any other contingency* to take such other action with respect to the Lease or Trust Estate as it shall deem advisable, without reference to the Beneficiaries and as if it were the sole legal and equitable owner thereof \* \* \*." (Italics ours.)

and in Article XIV (R. 122) as follows:

"This Declaration may be amended by written instrument executed and acknowledged by the Trustee and consented to in writing by three-fourths in interest of the Beneficiaries [the certificate holders]."

2. The Building Company holds a lease from the Trustee on the Cleveland Hotel property. In the estate of the Building Company under this lease the certificate holders have no interest of any kind or character.

3. There is owing to the Trustee from the Building Company certain back rent under the lease to the Building Company. The certificate holders are not creditors of the Building Company in respect of this back rent. The creditor of the Building Company in respect of this back rent is the Trustee (R. 100-101).

4. The Trustee is the sole creditor of the Building Company in respect of the back rent under the lease to the Building Company, and is the only creditor in its class. There was involved here, therefore, no question of the acceptance of the Cleveland Hotel Plan by creditors holding two-thirds in amount of the claims in the Trustee's class.

5. The Trustee, as the only creditor in its class, accepted the Cleveland Hotel Plan. The Plan was so accepted by the Trustee, however, only after it had received, in accordance with the provisions of Article XIV of the Declaration of Trust quoted above, written consents to and approvals of the Plan of three-fourths in interest of the certificate holders.

#### **THE PETITIONERS' ARGUMENTS.**

Counsel argue (Petitioners' Reply Brief, pages 2-3) that this respondent claims that the Cleveland Hotel Plan need not be fair and equitable. That is not this respondent's claim; its claim is rather that the Plan meets that test. The Cleveland Hotel Plan gives to the Trustee the alternative of taking a rejection of its existing lease with all the consequences incident to such rejection, or of accepting a modified lease on the terms proposed in the Plan. Since under the Cleveland Hotel Plan the Trustee could have its strict legal rights as upon rejection if it wanted them, the Plan is fair and equitable. It was so

held in the *Milwaukee* case, 318 U. S. 523; 532-534, 546-547, and in the *New Haven* case, 147 F. (2d) 40 (certiorari denied, 325 U. S. 884; rehearing denied, 325 U. S. [No. 2] xviii). Obviously, any plan which gives to a creditor the option to have its strict legal rights if it wants them must be fair and equitable, for the strict legal rights of a creditor are the maximum to which it is entitled in any event.

Counsel also claim (Petitioners' Reply Brief, pages 4-5) that the Cleveland Hotel Plan treats the Cleveland Hotel property as if it were an asset of the Building Company, and the certificate holders as if they were creditors of the Building Company; and counsel argue that the Cleveland Hotel Plan is, therefore, distinguishable from the plan in respect of the Terre Haute lines involved in the *Milwaukee* case. The factual hypothesis upon which counsel base this conclusion is absolutely untrue. The Cleveland Hotel Plan does not treat the certificate holders as creditors of the Building Company; it treats the Trustee as the creditor of the Building Company in accordance with the record (R. 100-101). Nor does the Cleveland Hotel Plan treat the Cleveland Hotel property as if it were an asset of the Building Company. The Cleveland Hotel Plan does not deal with the title of the Trustee in respect of the Cleveland Hotel property, or with the interest of the certificate holders therein. The Cleveland Hotel Plan deals, so far as relevant here, only with the estate of the Building Company under its lease, and with the claim of the Trustee against the Building Company for back rent and the security therefor. In the respects herein referred to, there is no difference between the Cleveland Hotel Plan and the plan as to the Terre Haute lines involved in the *Milwaukee* case and the plan involved in the *New Haven* case.

The argument of counsel (Petitioners' Reply Brief, pages 9-18) that the Cleveland Hotel Plan is not fair and equitable runs as follows: The lessee under the new lease proposed in the Cleveland Hotel Plan will be a new cor-

poration; of the assets of the new corporation, the Building Company will contribute 22% (being assets in or against which the Trustee now has no right or claim); of the assets of the new corporation, the Trustee will contribute 78% (being assets upon which the Trustee now has a lien for back rent); and counsel then argue that, in this situation, the stock of the new corporation should be distributed between the Building Company and the Trustee in the percentages aforesaid, and that it is not fair and equitable to distribute all of the stock of the new corporation to the Building Company. Here again counsel ignore undisputed facts. Their argument disregards, for the most part, the provisions of the Cleveland Hotel Plan with respect to the new lease which the Trustee will receive under the Plan. This new lease is a very valuable one to the Trustee and the certificate holders. (See discussion\* Trustee's Brief, pages 14-23.) To secure the new lease the Cleveland Hotel

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\* One comment of counsel in Petitioners' Reply Brief in respect of the new lease provided for in the Cleveland Hotel Plan should perhaps be noticed, inasmuch as no such comment appears in the previous brief for the petitioners. They claim (Petitioners' Reply Brief, page 14) that as interests are purchased out of net earnings (as provided for in the Cleveland Hotel Plan) the aggregate dollar amount of rent to be paid by the lessee to the Trustee (for the payment of fixed rent and on account of earnings) will be reduced. They fail to point out, however, as in all fairness they should, that as interests are purchased, the amount to be received by the individual certificate holders whose interests are not purchased will be increased. For example, if we assume in a given year hotel earnings, before fixed rent, in the amount of \$210,000.00, then

(1) When there are 7,000 publicly held interests the amount of rent to be received by each for that year would be

(a) \$25 as fixed rent;

(b) \$2.50 on account of earnings, computed as follows:  
 $\$35,000.00 (\$210,000.00 - \$175,000.00 \text{ fixed rent}) \times \frac{1}{2} \times \frac{1}{7000}.$

(2) When there are 5000 publicly held interests the amount of rent to be received by each for that year would be

*(Continued on following page)*

Plan provides that there shall be pledged all of the assets of the new corporation, including the assets contributed to the new corporation by the Building Company. Through this new lease the Trustee receives a fair and equitable consideration for waiving its security for part of its back rent claim, and permitting the disposition of that security and the disposition of the stock of the new corporation as provided for in the Cleveland Hotel Plan. No amount of argument can alter the plain facts that the new lease is a very favorable one to the Trustee; that there is put back of the new lease by the Building Company property of a value of about \$138,000.00, in or against which the Trustee now has no right or claim; and that under the new lease neither the lessee thereunder nor its stockholder, the Building Company, can realize one dollar of profit out of the hotel or its operations until the certificate holders have benefited, directly or indirectly, over and above the fixed rent, to an extent largely in excess of the present value of the Trustee's back rent claim. We quite fail to see how anyone can reasonably claim that the Building Company should put about \$138,000.00 into the new corporation and get only 22% of its stock, when under the terms of the Cleveland Hotel Plan that investment will be frozen without the possibility of return upon it to the Building Com-

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*(Continued from preceding page)*

- (a) \$25 as fixed rent;
- (b) \$6.07 on account of earnings, computed as follows:  

$$\$85,000.00 (\$210,000.00 - \$125,000.00 \text{ fixed rent}) \times \frac{1}{2} \times \frac{1}{700}.$$

In short, the reduction of the number of publicly held interests works to the advantage of the holders of interests not purchased by increasing their security and their assurance that the fixed rent will be paid and by enlarging their share of the hotel earnings. Provisions for the purchase of interests of the character provided in the Cleveland Hotel Plan are usual in land trust certificate issues and are customarily found in many other types of securities. They are generally recognized as advantageous to the security holders because they reduce the amount of the securities as the property ages.



pany until the Trustee, and through it the certificate holders, have benefited, directly or indirectly, to the extent of probably something like \$2,500,000.00.\* For whatever concession in its strict legal rights the Trustee makes in the Cleveland Hotel Plan, it is abundantly clear that the Trustee and the certificate holders receive through the new lease a fair *quid pro quo*. The Trustee was so convinced as a matter of business judgment; and the courts below so held. As the Circuit Court of Appeals said in its opinion (R. 836):

“\* \* \* In all the circumstances, the plan which the district court confirmed seems fair and equitable to the beneficiaries of the lessor-trustee; and it appears that the trustee exercised good business judgment in advocating acceptance of the plan of reorganization of the lessee-debtor.”

and (R. 839):

“As has been indicated, it is our judgment that, for concession of its strict legal rights, the trustee under the plan of reorganization of the lessee-debtor receives a fair and equitable consideration for execution of the new lease for the benefit of the beneficiaries of the trust.”

### IN CONCLUSION.

It is submitted, therefore, that the petition for writ of certiorari should be denied.

JOHN T. SCOTT,

BROOKS W. MACCRACKEN,

*Attorneys for Respondent,*

*The National City Bank of Cleveland,  
Successor Trustee.*

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\* See discussion Trustee's Brief, pages 20-21.